85-1284

NO. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALFREDO MONTEMAYOR,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

COUNSEL FOR PETITIONER

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QUESTION PRESENTED

Actual Conflicting interests from the dual representation of the appellant and his co-indictee by three lawyers adversely affected the Petitioner's Sixth Amendment right to the effective assistance of counsel and the decisions of the courts below that the actual conflicts of interest terminated with the withdrawal of two of the three lawyers on the first day of trial is in conflict with this Court's decision in Cuyler v. Sullivan, 446 U.S. 335 (1980).

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Actual Conflicting interests from the dual representation of the appellant and his co-indictee by three lawyers adversely affected the Petitioner's Sixth Amendment right to the effective assistance of counsel and the decisions of the courts below that the actual conflicts of interest terminated with the withdrawal of two of the three lawyers on the first day of trial is in conflict with this Court's decision in Cuyler v. Sullivan, 446 U.S. 335 (1980).

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THE OPINION BELOW

The Opinions below are included as Appendix A, [Magistrate's Recommended Findings of Fact and Conclusions of Law], Appendix B [District Court Opinion], and Appendix C [Court of Appeals for the Fifth Circuit.] Record references to the trial are (R) and to the 2255 hearings are (Hearing).

The District Court adopted, with supplementations, the findings of fact and conclusions of law filed by the magistrate who presided over the evidentiary hearings.

The District Court and the Court of Appeals rejected the Petitioner's claim that actual conflicts of interest adversely affected the assistance he received at trial. They held that the withdrawal of two of the three lawyers as "attorney of record" on the morning of trial avoided the infirmities of actual conflicts.

The Court found that when the original counsel of record, Max Luther withdrew, and

Oscar Gonzales substituted, the Petitioner failed to object.

There was substantial evidence both at the original trial and in the 2255 hearings that Gonzales and Luther's firm worked together on the joint representation, and continued to work together during the trial. The holdings below disposed of the claim that Luther and Herin violated the attorney client privilege by citing the Petitioner's failure to object to their testimony.

These findings and conclusions ignore the fact that the lawyers failed to object because they were laboring under actual conflicts of interest.

The Court found that Max Luther, who testified as a government witness did not violate the attorney-client relationship which existed between himself and the Petitioner because he testified about communications with the co-indictee and because the privilege was not claimed by

witness or counsel.

The Court apparently did not consider that communications between the lawyers and codefendant Scott as confidential communications as to the Petitioner even though made during the course of the joint representation.

The Court recognized that David Herin's testimony would have violated the attorney-client privilege but that the privilege was waived by the failure of the Petitioner's trial lawyer to object. The Court distinguished bolstering from Herin's testimony. The Court found that Herin merely repeated what the accomplice told him during the dual representation.

The Court further concluded that if there was any violation of confidential communications, the privilege was waived by the failure to object. These failures were characterized as "trial strategy."

The Courts below based their measure

of whether a constitutional infirmity had occurred because of actual conflicts of interest on **Washington v. Strickland**, 104 S.Ct. 2052 (1984). The harm from the divided loyalties in Petitioner's case are properly measured by this Court's ruling in **Cuyler v. Sullivan**, 100 S.Ct. 1708 (1980).

Both the District Court and the Court of Appeals summed up its basis for denying relief by acknowledging generally that the trial was infected by error, even prejudicial error, but that evidence of guilt was sufficient to overcome the harm because the result, a finding of guilt, was not unreliable. The District Court failed to see that appropriate trial objections would have kept from the jury inadmissible, prejudicial evidence, particularly the testimony of the Petitioner's own lawyers who expressed belief in his guilt. The failures of counsel and the resulting

damaging evidence were the very adverse effect wrought by the actual conflicts of interest from the dual representation.

STATEMENT OF JURISDICTION

The judgment sought to be reviewed was entered on November 1, 1985 by the United States Court of Appeals for the Fifth Circuit. This Court has jurisdiction to review this decision under the considerations of Supreme Court Rule 17.1. The Court below "has decided an important question of federal law which has not been and should be settled by this Court, [and] has decided a federal question in a way in conflict with applicable decisions of this Court." The opinions below are in conflict with this Court's ruling in **Cuyler v. Sullivan**, 446 U.S. 335 (1980).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * *

and to have the Assistance of Counsel in his defence."

STATEMENT OF THE CASE

Three privately retained lawyers, Max Luther, David Herin and Oscar Gonzales represented the Petitioner and his codefendant, Kenneth Scott, from the initiation of the government's charges for narcotics offenses.

Three days before the joint trial, Luther and Herin withdrew from representing codefendant Scott because they conceded they were burdened with actual conflicts of interest.

On the morning trial commenced, Luther's firm withdrew from representing the Petitioner, also citing actual conflicts of interest. Oscar Gonzales appeared with Luther and announced that he was ready to represent the Petitioner at trial without delay. At the trial, the codefendant, and lawyers Luther and Herin testified for the government against the Petitioner.

The Appellant was convicted of violating 21 U.S. Code 841(a), two counts, and 21 U.S. Code 846, one count and was assessed two ten year prison terms to be served concurrently and one ten year prison term to run consecutive to the first two. His conviction was affirmed by the United States Court of Appeals. **United States of America vs. Alfredo Montemayor,** 684 F.2d 1118 (5th Cir. 1982). He filed an action under 28 U.S.C.A. Section 2255 challenging the constitutionality of his conviction and sentence.

The District Court conducted evidentiary hearings and denied relief. The Court of Appeals for the Fifth Circuit affirmed. The Courts below held that the lawyers avoided the prejudicial infirmities of **Cuyler v. Sullivan,** 446 U.S. 335 (1980) when Luther and Herin withdrew as counsel of record. The Courts ignored the overwhelming and largely uncontroverted factual evidence from the trial and the 2255 hearings of the joint

representation of the codefendants by all of the lawyers and their decision is in conflict with this Court's holding in **Cuyler v. Sullivan.**

A. Evidence at the Trial

On December 3, 1980, the Petitioner and Kenneth Wayne Scott were arrested and charged with possession, distribution and conspiracy to distribute cocaine. Scott was arrested in the course of completing a sale of the narcotics to an undercover agent. The Petitioner was arrested at his office.

In the month or so preceding the arrest, undercover law enforcement agents had targeted Scott for a narcotics investigation and had him under surveillance.(R IV,99). One of the officers, Sharon Traylor, met with Scott on numerous occasions to arrange drug transactions. Scott identified numerous calls received on his beeper as from sources for the narcotics. Traylor memorized one of the telephone numbers announced and

traced it to the Petitioner's place of business. (R.IV, 71,72). On December 3, 1980, Scott and Traylor met in a restaurant to complete a drug transaction. Scott was waiting for his source to deliver the drugs. Traylor confirmed that the bank bag was empty while they were in the restaurent. However, Scott went outside at least twice and took the bag with him each time.

Agent Traylor observed the Petitioner come to door of the restaurant and call Scott outside. The surveillance team saw the two men go over to the Petitioner's car, and get inside briefly. They did not see or hear what else occured in the vehicle. When Scott returned to the restaurant, he had the cocaine.

B. Evidence of the Dual Representation and Conflicts of Interest

Immediately after his arrest, the Petitioner retained a Corpus Christi law firm, Barhnart and Luther. David Herin, an attorney employed by the firm, appeared on

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behalf of the Petitioner at the preliminary hearing. At that hearing, Kenneth Scott, was not represented by counsel. Scott's father was in court and talked to Herin about retaining the firm to represent his son. Mr. Scott subsequently hired the same lawyers as the Petitioner.

On December 18, 1980, the Petitioner took Scott to San Antonio to meet with another attorney, Oscar Gonzales. Gonzales prepared, and Scott signed, a typewritten statement exonerating the Petititoner. In it, he swore that he alone was guilty of the drug offenses, and that the Petitioner was innocent of any illegal activity. Gonzales and Luther assured Scott that they could "beat the case."

At the 2255 evidentiary hearing, Gonzales testified that he and Max Luther were working together as co-counsel from the beginning of the joint representation. Government prosecutor, Robert Berg testified that he had often observed Gonzales in court

on the pretrial matters for the codefendants and it was obvious the lawyers were working together.

At the 2255 hearing, Max Luther denied that the lawyers were associated until immediately before the trial. He could not explain how or why he exchanged motions with Gonzales in the early stages of the representation, or how he came to have possession of Scott's statement taken in Gonzales' office.

The trial strategy formed by the two lawyers was to use Scott to exonerate the Petitioner. The trial record reflects that the Motion to sever the codefendant's was based on that strategy. Luther refers to the statement as "proof" of the Petitioner's innocence. According to Gonzales, Luther planned to use the statement to "control" Scott. In his sworn affidavit in response to this 2255 Motion, Gonzales claimed:

> "* * * I was advised by both defendants that they were being represented by Max Luther * * *

"It was Montemayor's intention at that time to have me represent him in the disposition of this case and have Mr. Luther represent the co-defendant Kenneth Scott. In this matter, Montemayor would have complete control of what Scott would say which would hopefully effectuate a dismissal of Montemayor's case. * * *

"The purpose of taking Scott's sworn statement was to have some documentation that would in some way assist Montemayor and hopefully convince the Government to believe Montemayor was innocent of any wrongdoing." (R. 1, 154-55).

On January 5, 1981, Max Luther entered an appearance as attorney of record for both the Petitioner and Scott. The co-defendants were formally arraigned and a joint trial date was set.

On January 21, 1981, Luther filed a Motion to Sever.(R. 1, 94; 2, 439-440). The motion alleged that separate trials were necessary and that Scott had to be tried first because Montemayor intended to have Scott testify to prove his [Montemayor's] innocence. Luther argued that if Scott wasn't tried first, he might claim the Fifth Amendment during the Petitioner's trial and

prejudice the Petitioner's case.

At the final pretrial hearing on February 2, 1981, Assistant U.S. Attorney Robert Berg complained that the dual representation created possible conflicting interests.

The Court informed the codefendants that potential conflicts of interest were involved in the dual representation by Luther's firm. The Court did not inquire whether either or both of them were aware if they had potential or actual conflict in this case, or whether they wished to waive any conflict which might exist.(R, VII,7). It was at this same hearing that Luther announced one client was innocent and one guilty, and they were set for a joint trial. These issues were never raised by the Court nor did he explain their ramifications to either defendant.

Max Luther assured the Court that there were no conflicts between his clients. Following these assertions, the Prosecutor

announced that he intended to convert the potential conflict into an actual conflict.

In open court, the prosecutor offered "leniency" to Kenneth Scott, if Scott would talk to him alone, without his lawyer, and away from the Petitioner.(R 7, 9-11). The Court inquired of the codefendants whether this new development by Berg made them feel they needed separate lawyers. The Petitioner asked to discuss the matter with Luther; Scott was silent. The Court recessed the hearing so the lawyer and his clients could confer.

When the hearing resumed, Luther informed the court that after talking to both his clients separately and together, he was still convinced they had no conflicting interests because Scott was guilty and the Petitioner was innocent and Scott planned to testify for the Petitioner.

Luther conceded that these circumstances would present conflicting interests only if: 1) the court refused to

grant the severance and the cases had to be tried together; and/or, 2). the government reduced or dismissed charges against Scott and Scott accepted a deal. (R.VII, 13).

The Court refused to sever the cases in the face of these actual conflicts of interest and Luther took no action in response to these circumstances which created an admitted actual conflict of interest.

Luther refused to permit Scott to talk to the government. At the 2255 hearing, Luther claimed that he believed both clients were innocent all along. He couldn't explain his planned use of Scott's incriminating statement.

On March 4, 1981, about two weeks before trial, Scott was arrested for new drug offenses in state court. Scott called the Barnhart and Luther law firm to represent him.

Between March 4 and 10, the Government contacted Scott directly, and offered to

dismiss all state and federal charges if Scott fired Luther's firm and testified against the Petitioner.

Scott went to Luther's firm for advice. He met with David Herin on March 10, 1981, for about three hours; and, on March 12, Scott met with both Herin and Luther.

Scott told his lawyers that the government offered to dismiss the charges against him for his testimony against the Petitioner. Scott claimed, for the first time, that the Petitioner was guilty of the December drug offense and that he had lied when he said that the Petitioner was innocent. Max Luther had Scott sign another statement that he had lied to the lawyers until March 10 and that the lawyers didn't know the truth until after that date. The statement was obviously intended to exonerate the lawyers from any wrongdoing, such as suborning perjury. The statement was introduced at the trial.

Since Scott's deal with the government

was contingent on Luther getting out of the case, Luther filed a motion to withdraw as Scott's lawyer on March 13. Magistrate De Ases had already appointed a lawyer for Scott although the court had not acted on Luther's motion.

The trial was scheduled for March 16. Luther moved to withdraw as the Petitioner's attorney of record and cited conflicts of interests. Amazingly, the prosecutor opposed Luther's withdrawal, in spite of the actual conflicts because he opposed a delay in the trial. Luther assured the judge that there was no need for delay because San Antonio lawyer, Oscar Gonzales, was in court already prepared for trial. Gonzales became attorney of record and jury selection began.

The Petitioner's attorney Max Luther was called as a government witness.(R.IV,187-188; 191). The prosecutor repeatedly asked the lawyer to tell the jury that before the trial he was representing

both the Petitioner and Scott in the case on trial.(R.IV, 198). Luther told the jury that he wasn't involved in the trial because he had conflicting interests in the case representing either client.(R.IV,202). Earlier he had believed only Scott was guilty and would exonerate the Petitioner; but now, Scott claimed both of them were guilty, so he couldn't represent the Petitioner.

Luther testified about numerous meetings between Gonzales, Luther, Herin, Scott and the Petitioner where Scott exonerated the Petitioner. On redirect examination, the prosecutor attacked Luther for impeding the government's efforts to deal with co-defendant, Kenneth Scott. (R. IV, 204-208;215-220).

Through Luther, other details of the joint representation were revealed: the disparity in the fees paid, $10,000.00 by the Petitioner and $300.00 by Scott (R. IV, 208); and Luther's self-serving statement

removing himself for any liability for suborning perjury, if any, for Scott's original planned testimony was introduced to the jury.(R. IV, 209).

The clear message to the jury in Luther's testimony was that he removed himself from the case when Scott decided to testify that the Petitioner was guilty.

C. The Defense

The defense presented evidence that the relationship between Petitioner and Scott was legitimate. Scott, a plumber had worked at the two Feminique Health spas owned by the Petitioner and his wife. The spas were financially successful. Two defense witnesses claimed Scott was in debt to them and the Petitioner and that on December 3, 1980, the Petitioner met with Scott to try to collect their money. Defense counsel argued that Scott was a liar and the government cheated in getting Scott to implicate the Petitioner.

Lawyer David Herin was called as a

defense witness solely to impeach Scott's denial that he had a deal with the government to dismiss his cases in return for his testimony against the Petitioner. After Herin testified, the prosecutor arranged a meeting between Herin and Scott to "refresh" Herin's recollection about the details of the offense as related by Scott. (Hearing II, 110-129). The following day, Herin was recalled as a government witness and corroborated Scott's testimony about details of the offense. No one challeged Herin's testimony as a violation of the attorney-client privilege or a violation of the rule.

D. The 2255 Evidentiary Hearings

All of the lawyers named in the 2255 Action responded by affidavit and appeared personally to testify before the Honorable Eduardo De Ases, United States Magistrate.

At the hearing, Luther and Gonzales admitted to continued consultation with each other during the Petitioner's trial although

Luther had removed himself as counsel of record on the first day of trial. David Herin admitted that he met with the prosecutor and Kenneth Scott during the trial, to prepare for his testimony against the Petitioner. All lawyers agreed that Luther and Herin could not remain "counsel of record" because of actual conflicts of interest.

POINT OF ERROR ONE

ACTUAL CONFLICTING INTERESTS FROM THE DUAL REPRESENTATION OF THE APPELLANT AND HIS CO-INDICTEE BY THREE LAWYERS ADVERSELY AFFECTED THE PETITIONER'S SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND THE DECISIONS BELOW THAT THE ACTUAL CONFLICTS OF INTEREST TERMINATED WITH THE WITHDRAWAL OF TWO OF THE THREE ORIGINAL LAWYERS ON THE FIRST DAY OF TRIAL IS IN CONFLICT WITH THIS COURT'S DECISION IN **CUYLER V. SULLIVAN**, 446 U.S. 335 (1980).

The Courts below found that Luther did represent both codefendants and although Luther was counsel of record, that Oscar Gonzales was sub rosa lead counsel. In spite of that finding, the Court held there were no actual conflicts of interest because Gonzales was never attorney of record for Scott, and Luther's firm withdrew of record before trial.

The Petitioner was charged with waiving the attorney-client privilege when his

lawyers testified at his trial. The forced withdrawal "of record" of Max Luther on the morning of trial was held to relieve any actual conflicts of the dual representation and avoid the sanctions provided by Cuyler v. Sullivan, 100 S. Ct. 1708 (1980). The Court ignored Luther's testimony at the evidentiary hearing that he withdrew from representing the Petitioner on the morning of his trial, under pressure from the government.

The Court of Appeals for the Fifth Circuit affirmed the District Court and summarily disposed of the claim that the actual conflicting interests between the multiple lawyers and clients adversely affected the trial representation. The Court of Appeals also relied on Luther's withdrawal, as attorney of record, at the beginning of the trial, as relieving his duty of loyalty to his client.

The factual and legal determinations

below are clearly erroneous and in conflict with this Court's Decision in **Cuyler v. Sullivan.**

One of the threshold issues in this case is whether the lawyers engaged in multiple representation. This is a mixed determination of fact and law that requires the application of legal principles to the historical facts of this case. There was overwhelming evidence that Oscar Gonzales and Luther's law firm provided legal representation for both the Petitioner and his codefendant from their arrest through the trial. Nomination of "counsel of record" was a matter of form, not substance. During the pre-trial period and in the opinions of the courts below, Oscar Gonzales was recognized as "sub rosa" lead counsel.

As a government witness in the trial, Luther admitted to the numerous strategy meetings with Gonzales throughout the trial although he tried to extricate himself from

that association at the magistrate's hearing.

Oscar Gonzales freely admitted the relationship between the lawyers and co-defendants. They were involved in the case from the beginning to the end.

Government prosecutor Robert Berg corroborated Gonzales version of the association of counsel. He had observed Gonzales in court each time the codefendants appeared in pre-trial hearings. Gonzales was obviously consulting with Luther about both clients on each setting. The prosecutor was aware that Gonzales, Luther, and Herin continued to meet during the trial.(Hearing II, 20).

Max Luther admitted that he withdrew from the case because of pressure from the government.(Hearing II, 30).

The dual representation affected the ability of Gonzales to attack the credibility of the government's primary witnesses: the co-defendant and the lawyers involved in the dual representation.

Instead, the co-defendant's testimony against the Petitioner was corroborated by the lawyers who represented both of them.

The actual conflicts of interest and the harm resulting deprived the Petitioner of his right to the effective assistance of counsel as enunciated by this Court in **Cuyler v. Sullivan**, 446 U.S. 335; **Wood v. Georgia**, 450 U.S. 261 (1981); and **Glasser v. United States**, 315 U.S. 60 (1948).

In **Cuyler v. Sullivan**, this Court held that the Sixth Amendment protects the right to counsel's undivided loyalty. A defendant who raised no objection at the trial must demonstrate that an actual conflict of interest adversely affected his representation at trial. Where the actual conflicting interests is demonstrated, prejudice is presumed.**Wood v. Georgia**, 450 U.S. 261 (1981).

It is not sufficient to advise codefendents of potential conflicts. The court has a duty to see that the trial is

conducted with solicitude for the essential rights of the accused. That duty does not end upon the bare assurance of counsel that there are no conflicts in any case of multiple representation.**Glasser** v. **United States**, 315 U.S. 60 (1948).

The Petitioner's right to conflict-free counsel was nullified by the dual representation and was further aggravated by the unethical behavior of the government prosecutor. The prosecutor intentionally created additional actual conflicts of interest to separate lawyer and clients.

There was no evidence to support a conclusion that the Petitioner ever waived his right to conflict free counsel and the Court will not presume acquiescence in the loss of fundamental rights.**Johnson v. Zerbst**, 304 U.S. 458 (1938). Under this Court's ruling in **Cuyler v. Sullivan**, the proof of actual conflicts that adversely affect counsel's performance presumes prejudice.

The Courts below applied a hybrid version of the ruling in **Washington v. Strickland** and **Cuyler**, to dispose of the Petitioner's claims. They held that the overwhelming evidence of guilt removed any taint from counsels' errors. They held that the mere signing on and off as counsel of record was sufficient to remove any infirmities that obviously existed had Luther and Herin sat at counsel table during the trial and permitted the record to continue to reflect they were counsel of record. In **Strickland v. Washington**, this Court distinguished the prejudice and harm resulting from divided loyalties between client and lawyer from those issues raised by his technical competence.

The findings below are clearly in conflict with this Court's position on Sixth Amendment claims based on divided loyalties between lawyer and client and lawyers and multiple clients. Unconstitutional multiple representation is never harmless error and

there is no need for prejudice to be demonstrated. The loyalty of interests that a lawyer must have for his client is the foundation of any effective representation.

CONCLUSION

The Petitioner did not receive the conflict-free, effective assistance of counsel guaranteed by the Sixth Amendment. Counsel freely took on the representation of co-defendants, knowing from the outset that they had conflicting interests because one claimed innocence and the other confessed guilt.

The removal of one of the lawyers as attorney of record did not eliminate the infirmities of the conflicting interests because the representation continued."Sub rosa" counsel merely changed places.

The decisions of the Courts below are clearly in conflict with this Court's opinion in **Cuyler v. Sullivan.** Alternatively, the decision below removes the taint of conflicting interests by the

mere removal of the name of counsel of record and such a finding is a clear departure from this Court's teaching.

The Petitioner prays this Court will grant certiorari, and upon review, grant relief.

Respectfully submitted,

Will Gray*

Carolyn Garcia
2038 Lexington Street
Houston, Texas 77098
713-759-0585

Counsel for Petitioner

*Counsel of record

Dated this 1 day February, 1986.

CERTIFICATE OF SERVICE

A copy of this Petition was mailed to Susan Yarborough, counsel for Respondent, at her offices at 515 Rusk Avenue, Houston, Texas, on February 1, 1986.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CRIMINAL ACTION NO. C-80-108
CIVIL ACTION NO. C-83-175

UNITED STATES OF AMERICA

VS.

ALFREDO MONTEMAYOR

MEMORANDUM AND RECOMMENDATION

Movant was convicted of three counts in a seven-count indictment, namely possession with intent to distribute cocaine, distribution of cocaine and conspiracy to distribute cocaine. On direct appeal, the conviction was affirmed. Movant now files a motion under 28 U.S. §2255 which raises four grounds:

1. Ineffective assistance of counsel due to a conflict of interest;

2. Ineffective asssistance of counsel due to a violation of the attorney-client relationship;

3. Ineffective assistance of counsel because trial counsel was unprepared for trial; and

4. Ineffective assistance of counsel on appeal because appeallate counsel refused to raise ineffective assistance of counsel as a ground for appeal.

An evidentiary hearing was conducted by the undersigned. Counsel was invited to submit briefs and Movant has submitted a post-hearing brief while Respondent rests on the response previously filed.

FINDINGS OF FACT

1. Movant was admonished before trial about the possibility of a conflict by being represented by the same lawyer who represented his co-indictee. (Trial tr. pp. 793-799; 807-811).

2. Prior to the beginning of trial, Movant's original counsel withdrew.(Trial tr. p. 819).

3. Another attorney undertood to represent Movant on trial without objection from Movant.(Trial tr. p. 819).

4. There was no objection to the testimony

of the two lawyers who had previously represented Movant. (Trial tr. pp. 187-220; 350-357; 517-576; 609-640).

5. A careful review of the testimony of Max Luther (Trial tr. p187-220) reveals no violation of the attorney client relationship which exissted between Luther and Movant.

6. Attorney David Herin was called as a defense witness. (Trial tr. p 517).

7. On cross-examination, Herin testified Movant's co-indictee Scott, had told Herin Movant had given Scott the cocaine which Scott subsequently sold to an undercover agent. (Trial tr. p.521).

8. There was no objection from Movant's trfial attorney to Herin's testimony. On re-direct Movant's trial attorney attempted to show Scott's implication of Movant came after Scott was offered a "deal" by the Government. (Trial tr. p. 524).

9. The following day of trial, the Government called Herin as a witness,

without objection from Movant's trial counsel. (Trial tr. p. 607).

10. Herin testified without objection, that Scott implicated Movant in the cocaine transaction which led to Movant's eventual conviction herin. (Trial tr. p. 612, 615, 618).

11. There was no "bolstering" of Scott's testimony by Herin. Herin merely repeated what Scott had previously told him without verification or characterization of Scott's credibility.

12. After discussing the issue on appeal, appeallate counsel determined the most viable issues did not include ineffective assistance of trial counsel.

13. Movant was very active in pursuing appeal and conferred frequently with appellate counsel.

CONCLUSIONS OF LAW

1. The waiver by Movant of his original attorney's possible conflict of interest is

manifest on the face of the record. United States v. Garcia, 517 F. 2d 272 (5th Cir 1975);

2. To invoke the attorney-client relationship, Movant must show he was a client of the lawyer-witnesses, Luther and Herin; that Movant communicated some matter to his lawyers; that the communication related to a fact of which the attorneys were informed by Movant without the presence of strangers for the purpose of securing legal services and not for the purpose of committing a crime and that the privilege has been claimed and not waived by Movant. In re Grand Jury Proceedings, 517 F.2d 666, 521 F.2d 815 (5th Cir 1975).

3. The testimony of Luther, who had withdrawn prior to trial as Movant's lawyer, did not incriminate Movant, and at most was harmless error. United States v. Crockett, 506 F.2d 759 (5th Cir. 1975).

4. The testimony of Herin, who was

employed by Luther and thus withdrew prior to trial, had to do with what Movant's co-indictee told him. Herin never testified as to anything Movant said to him and thus Herin's testimony did not violate the attorney-client privilege. In re Grand Jury Proceedings, supra.

5. Movant's failure to object or invoke the attorney-client priviledge prior to the testimony of his former attorneys constitutes a waiver of any violation of the attorney-client privilege. In re Grand Jury Proceedings in Matter of Freeman, 708 F.2d 1571, 1575 (11th Cir. 1983).

6. Movant can make out a claim of ineffective assistance of counsel only by pointing to specific errors made by trial counsel. United States v. Cronic, 52 L.W. 4560(1984).

7. Movant's complaints about his trial counsel's conduct "come within the amorphus zone known as 'trial strategy' or 'judgment

calls'" Hollenbeck v. Estelle, 672 F.2d 451 (5th Cir 1982).

8. Movant's most bitter complaints are leveled at the decision to call the former attorneys as witnesses. Movant concedes that "...the only defense was the credibility of (Movant's co-indictee) and his bias and motive for changing his testimony..." Brief in support of (Movant's §2255 Motion), p. 31.

a. The Court "must indulge a strong presumption that counsel's challenged conduct falls within the wide range of reasonable professional assistance: that is, (Movant) must overcome the prsumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'"

b. "The (Movant) must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A reasonable probability is a probability sufficient to undermine confidence in the outcome."

c. "(A) court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Strickland v. Washington, (1984) 52 L.W. 4565.

9. "The government's evidence...thoroughly demonstrated (Movant's guilt)." United States v. Montemayor, 684 F.2d 1118 (5th Cir 1982).

10. Based on all of the foregoing, Movant's complaints about ineffecive assistance of counsel are without merit.

RECOMMENDATION

Movant's §2255 Motion should be DENIED.

Respectfully submitted this 8th day of June, 1984.

signed/Eduardo E. deAses,
United States Magistrate

APPENDIX B

IN THE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CR. NO. C-80-108

UNITED STATES OF AMERICA

VS.

ALFREDO MONTEMAYOR

OPINION OF THE DISTRICT COURT

This Motion to Vacate and Set aside Sentence, 28 U.S.C.A. § 2255 is based on allegations of ineffective assistance of counsel, both trial as well as appellate. After a review of the record, the Court adopts the findings and conclusions and recommendantions of the Magistrate, and finding no substance to the allegations, the Court denied Montemayor's Motion to Vacate and Set Aside Sentence.

In seven counts, Montemayor was accused of violating the narcotics laws of

the United States. 21 U.S.C.A. §841(a) and 21 U.S.C.A. §846. He was convicted of three. United States of America v. Montemayor, 684 F.2d 1118(5th Cir. 1982).

Scott was also accused in the same indictment. Initially Montemayor and Scott were represented by Mr. Luther and Mr. Herin, who worked for Mr.Luther. Mr. Luther believed such arrangement was ethically possible until Scott changed his position and incriminated Montemayor. Montemayor was also represented by Oscar Gonzales, who, in fact, was sub rosa lead counsel. Montemayor and Gonzales counted on Scott's fidelity and Luther's ability to control Scott. When Scott made his deal with the Government for his testimony, Luther resigned and Gonzales represented the Defendant at trial.

The defense theory at trial, (approved by Montemayor) was to descredit Scott's accusations against Montemayor by demonstrating he was a liar testifying for

leniency. To impeach Scott, Gonzales needed prior inconsistent statments and he used a statement Scott had given Gonzales exculpating Montemayor. For the same reason, neither Gonzales nor Montemayor objected to testimony by Herin and Luther that confirmed Scott's earlier statements to them that Montemayor was innocent. A client can waive the attorney-client privilege. Montemayor waived the privilege when he failed to object to the testimony of Herin and Luther. He cannot be heard to complain when the strategy proves unsuccessful. See United States v. King, 484 F.2d 924, 927-928 (10 Cir. 1973); United States v. Gurtner, 424 F.2d 292, 299 (9th Cir. 1973).

Only Gonzales represented Montemayor at trial. Luther had earlier withdrawn in time to prevent an actual conflict at trial. The prejudicial conflict forbidden by Cuyler v. Sullivan, 100 S.Ct. 1708 (1980) was avoided. Additionally, the Court has great

question in its mind whether Montemayor ever considered Luther as his attorney. While Luther was rendering services to Montemayor, it is apparent to the Court that Montemayor actually looked to Gonzales for representation and was attempting to manipulate Luther to take advantage to Scott.

Montemayor also snaps at Gonzales' heels for failing to withdraw as counsel so that he could himself bolster Scott's(sic) own story and for failure to further investigate the case. It is remote that Gonzales made error by failing to withdraw at the last minute to bolster his own client's story, even would that have been permitted. Other accusations are simply Montemayor's sharpshooting with hindsight, none of which give rise to the deference due an attorney in his handling of the case.

Montemayor retained G. Rudolph Garza and Ruben Sandoval to represent him at the

appellate level. Montemayor believes and claims appellate counsel should have argued ineffective assistance of trial counsel at the appellate level. Such argument was considered by both Garza and Sandoval, but rejected in favor of points they believed stronger and more persuasive than ineffective assistance of counsel. While Montemayor urged the issue, he did not insist on it. Since there was no ineffective assistance of trial counsel, Garza's decision was correct.

Strickland v. Washington, 104 S.Ct. 2052 (1984) establishes the criteria for determination of constitutional ineffectiveness of trial counsel sufficient to establish a Sixth Amendment violation. Those standards will also be applied to appellate counsel. Strickland, requires reasonably effective, not error free, representation. Montemayor must demonstrate, first, a deficient counsel

making such serious errors that counsel was not functioning in his adversary role, and second, that the deficient performance prejudiced Montemayor to such extent that he was deprived of a fair trial with unreliable results because of a breakdown in the adversary system.

Not only has Montemayor failed to demonssstrate deficient counsel, but he also fails to establish prejudice to him. It cannot be concluded that he was deprived of reasonably effective assistance of counsel. Without regard to all errors attributed to trial and appellate counsel, the Defendant was not deprived of a trial with unreliable results. To reach its decision, the jury had available the testimony of the undercover agent who purchased the cocaine from Scott and who was advised by Scott at the time of sale the source owned a health spa, and was going to a bank to deliver cocaine. A police officer testified that he

followed Montemayor from his health spa to the bank. Scott's testimony was corroborated by undercover and surveillance officers. The Fifth Circuit has already determined that there was sufficient evidence to overcome prejudicial trial errors if any had been made. United States of America v. Montemayor, 684 F.2d 1118 (5th Cir. 1982).

ORDERED this 8 day of October, 1984.

/s/
Hayden W. Head, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-2609

SUMMARY CALENDAR

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALFREDO MONTEMAYOR,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(November 1, 1985)

Before CLARK, Chief Judge, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:*

Montemayor sought relief under 28 U.S.C. Sec. 2255 from his federal conviction for possessing, distributing, and conspiring to distribute cocaine. Montemayor raises four issues: (1) whether his attorneys' asserted

conflict of interest denied him the effective assistance of counsel; (2) whether the testimony of his former attorneys during the trial was prohibited by the attorney client privilege; (3) whether his trial counsel was ineffective; and (4) whether his appellate counsel was ineffective on his first appeal to this court.

A magistrate held an evidentiary hearing on Montemayor's Sec. 2255 motion and filed findings of fact and conclusions of law, adopted with supplementations by the district court. We affirm the district court's denial of Montemayor's petition.

I

When Montemayor and his codefendant, Scott, were charged with violating federal drug laws, Montemayor hired Luther and Herin to represent him, paying Luther $10,000.00. Scott had no lawyer, so his father arranged to have Luther also represent Scott. Shortly thereafter Montemayor hired another lawyer,

Gonzalez. Montemayor than took Scott to Gonzalez's office where Scott signed an affidavit exculpating Montemayor. Gonzalez hoped that the affidavit would persuade the government to drop the charges against Montemayor or that if the cases were severed for trial Scott would testify for the defense in Montemayor's trial. Consistent with this strategem, Luther sought separate trials for Scott and Montemayor and counseled Scott not to talk with the government. At a pretrial hearing, the prosecution asked the court to warn the defendants about a possible conflict of interest in Luther's continued representation of both defendants. The court told the defendants that they had a right to independent counsel and warned of possible conflicts. Luther told the court he would have no conflict if the cases were severed, but that he might otherwise. Scott and Montemayor told the court that they understood. The prosecutor then stated that

he would extend Scott "some leniency" for the "mere privilege of being able to talk to him outside the presence of Luther and Mr. Montemayor." Montemayor thought the situation over but decided to keep Luther as his attorney.

A few days before trial, Scott told the prosecutor he might be willing to testify for the government. He was also told that something could be arranged if he fired Luther. He did so, and Luther withdrew as counsel for Montemayor with Montemayor's consent. At Montemayor's trial, Luther testified, without objection, that Scott had insisted on Montemayor's innocence right up until trial. The defense then called Herin, an associate of Luther's to testify to substantially the same thing. No objection was made to the testimony of either Luther or Herin on the basis that the substance of their testimony contained matter protected by Montemayor's attorney-client privilege.

Before sentencing, Montemayor fired Gonzalez and hired attorney Sandoval, who in turn hired attorney Garza. Montemayor urged them to argue that his earlier counsel had labored under a conflict of interest and that he had ineffective assistance of counsel. His counsel, however, fearing that those arguments might weaken other points they wished to raise, prevailed upon him to not make those points on his appeal. The appeal failed. United States v. Montemayor, 684 F.2d 1118 (5th Cir. 1982).

II

Montemayor's contentions are easily disposed of. Because Montemayor did not object to the possibility of a conflict with his attorneys, he must show that an actual "conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 348 (1980). He made no such showing in the trial court. We have previously sais that, "a conflict of interest

is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to a codefendant whom counsel is representing." United States v. Carr, 740 F.2d 339, 348 (5th Cir. 1984), quoting Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir.), cert. denied, 457 U.S. 1135 (1982). Montemayor was not represented by Luther or Herin at the time his case went to trial. Scott had never been represented by Gonzalez. Montemayor had only alleged that there was a conflict. An allegation of a conflict without more is not sufficient to warrant relief. United States v. Lyons, 703 F.2d 815, 821 (5th Cir. 1983).

Montemayor's second contention is that the attorney-client privilege was violated by the testimony of Luther and Herin. Montemayor waived any privilege he had. He made on objection at trial to the testimony of the lawyers. Indeed, he did not want to

object; he had called one lawyer and the other said what he hoped he would say. The trial strategy pursued by Montemayor -- to prove that Scott was a liar -- required the testimony of Luther and Herin to be successful. We reject Montemayor's claim that his attorney-client privilege was violated during his trial.

Montemayor asserts that he was deprived of his right to effective assistance of counsel both at trial and again on his first appeal. Montemayor must show that his conviction "resulted from a breakdown in the adversary process that render[ed] the result unreliable." Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984), and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 2068. Under these stan

dards, Montemayor has presented no serious challenge to his conviction. He claims that his counsel was ineffective because of conflicts between himself and counsel and because counsel failed to object to the testimony of Luther and Herin. Those claims have been rejected. Montemayor complains that Gonzalez should have resigned as counsel to appear as a witness on his behalf to explain the affidavit Scott signed in Gonzalez's office. It is not so clear as to "undermine confidence in the outcome" that Gonzalez would have been able to aid the cause of his client by so acting, and Montemayor certainly has failed in carrying his burden on the issue.

Montemayor also complains that his counsel was ineffective in that he did not assert the attorney-client privilege. Gonzalez, with the approval of his client, made a conscious trial strategy decision to impeach Scott with the testimony of Luther and He-

rin. We have held that a conscious and informed choice to pursue a certain course at trial cannot be the basis for an ineffective assistance claim unless it is so unfair as to permeate the entire trial with "obvious unfairness." Garland v. Maggio, 717 F.2d 199, 206 (5th Cir. 1983). Montemayor has not shown that this strategy was ill chosen or that he suffered thereby. His argument fails.

Montemayor makes a point of the language used in his earlier appeal, where it said:

"We finally note that in another setting, with less convincing proof of guilt, more timely and proper objections by defense counsel, and less "opening of the door," some of the prosecutorial actions of which appellant complains, at least if related to more sensitive matters than here, might well result in reversal . . . However, we find no reversible error in the particular circumstances of this case, the judgment of conviction is affirmed."

United States v. Montemayor, 684 F.2d 1118, 1126 (5th Cir. 1982) (emphasis added). Rather than supporting his case, however, this language of the court indicates that in the

circumstances of this case, counsel was adequate and the conviction was proper.

Finally, Montemayor claims that his first appellate counsel was inadequate. This claim has no merit. The claim is based on the fact that appellate counsel did not want to raise claims of ineffective assistance of counsel on appeal, a strategy with which Montemayor reluctantly agreed. As discussed above, those claims would not have prevailed and counsel cannot be condemned for failing to raise them on appeal. In any event, Montemayor agreed with the strategy, and he cannot now be heard to complain.

AFFIRMED

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens or the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.